Nos. 81-1029, 81-1118

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Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, LOCAL 342, *et al.*,

Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., *et al.*,

Respondents, Nos. 81-1029
81-1118

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that a seniority system which perpetuates the effects of racial job segregation is unlawful in violation of Title VII of the Civil Rights Act of 1964 because it is not a "bona fide" seniority system where the system severely limited the employment opportunities of black workers, the system was developed by unions with overtly discriminatory practices, the system was gerrymandered in an irrational manner, the development of the system was affected by racial considerations, the historically all-white unions at the plant rejected the bargaining proposals made from 1968 through 1977 by a predominantly black union and the company to institute a seniority system which would end the

racially discriminatory operation of the system, and union officers of the historically all-white unions demonstrated clear racial bias during the period when these unions rejected efforts to establish a nondiscriminatory seniority system.

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Nos. 81-1029, 81-1118

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October Term, 1981

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, LOCAL 342, et al.,
Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.
Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., et al.,
Respondents, Nos. 81-1029
81-1118

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This fair employment action was filed on October 16, 1972, alleging that United States Pipe and Foundry and 12 unions which represented employees at the Company's

Bessemer, Alabama plant engaged in systematic discrimination in job assignment, training and promotion of black employees in violation of Title VII of the Civil Rights Act of 1964 (as amended 1972) and 42 U.S.C. §1981. On the eve of trial, following extensive discovery, all parties to the litigation agreed upon injunctive relief, including modification of the seniority system at the plant. Also the plaintiffs and the company entered into a separate agreement including the payment of $510,000 in back pay in settlement of all the monetary claims against it by the class members. The plaintiffs also agreed not to seek back pay against the International Brotherhood of Electrical Workers, Local 136.[1/]

1/ Summary Judgment had been granted in favor of the International Brotherhood of Electrical Workers and no appeal was taken from that Judgment.

The issue reserved for trial was the monetary liability of the remaining five international unions and their five locals at the Bessemer plant. The plaintiffs stated that they were not seeking to introduce evidence with the intent of establishing that the United Steelworkers of America and its Local 2140 had liability for back pay. However, the plaintiffs maintained that if the other eight unions, hereinafter referred to collectively as the "AFL" unions,[2/] introduced evidence that demonstrated that the Steelworkers were liable for back pay, then the plain-

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2/ The contested representational elections in the 1940s at the Bessemer plant--which are relevant to the issue presented for review, the legality of the seniority system--involved disputes between unions belonging to the American Federation of Labor and the Steelworkers which belonged to the Congress of Industrial Organizations.

tiffs would request that the Steelworkers be assessed the liability established by the AFL Unions.[3/]

The critical issue raised in the petitions for certiorari filed by the eight AFL Unions[4/] is whether the seniority system to which they were parties was created or maintained with the intention to discriminate. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Black employees had been assigned on the basis of race to poorly paid "dead

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3/ All ten unions were represented by the same counsel in the district court. On appeal in the Fifth Circuit the AFL Unions and the Steelworkers were separately represented.

4/ Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers and its Local 583; International Association of Machinists and Aerospace Workers and its Lodge 359; International Molders and Allied Workers Union and its Local 342; Patternmakers League of North America and its affiliate, Patternmakers Association of Birmingham.

end" jobs. The separate seniority units into which employees were segregated largely coincided with the distinct bargaining units represented by each of the AFL Unions and the Steelworkers. The AFL Unions were virtually all-white whereas the Steelworkers, which represented the poorly paid black workers, was predominantly black. Under the pre-settlement seniority system an employee's seniority was based upon service in a particular department or seniority unit, rather than service at the plant. Since a black worker with years of service in a poorly paid black seniority unit necessarily forfeited his seniority upon transferring to a traditionally white job, the seniority system effectively locked blacks into positions to which they had been assigned

on the basis of race. The plaintiffs alleged that the system was designed and maintained with the purpose of discriminating against black workers.

The district court held that a part of the seniority system was created with an intent to discriminate. The district court determined that the transfer in 1950 of 10 positions staffed by whites from the Steelworkers' unit to the Boilermakers' and Machinists' units in exchange for all of the black workers represented by the Boilermakers and Machinists was "not... rational" and "that inconsistent approaches [were] taken with respect to helper positions - separating some (those with black incumbents) from their related skilled positions, while joining others (those with white incumbents) to their related skilled

positions." App. 19b.[5/] Although finding that the seniority system was "instituted at a time of widespread racial discrimination--in the plant [and] in the unions [footnote omitted]", App. 20b, that "racial considerations were involved in the 1940 [union] elections which produced the bargaining units," App. 20b, and that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 [collective bargaining] negotiations....," App. 23b, the district court concluded that the seniority system -- apart from the 1950 transfers -- was not created or maintained with an intent to discriminate, App. 25b.

The court of appeals ruled that, as a matter of law, the substantial adverse racial effect of the system, the "avowedly

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5/ The reference is to the Appendix to Petition for a Writ of Certiorari, No. 81-1118.

racist policies of the craft [AFL] unions," the genesis of the system in intentional discrimination, and the racially oriented collective bargaining negotiations compelled the conclusion that the seniority system was not bona fide since it resulted from and was continued with the purpose of intentional discrimination. App. 16a-20a. The appellate court held that the Boilermakers, Machinists, Molders, and Patternmakers and their local affiliates were liable for the economic harm suffered by black workers as a consequence of the non-bona fide and illegal seniority system.[6/]

6/ In view of the repeated efforts by the Steelworkers to persuade the company and the AFL Unions to adopt a non-discriminatory seniority system, the court of appeals "absolve[d] the Steelworkers from any responsibility under Title VII for the discriminatory seniority system at the Bessemer plant." App. 24a-25a. Neither the AFL Unions nor the plaintiffs have petitioned this Court to reverse this specific holding.

REASONS FOR DENYING THE WRIT

1. A seniority system which perpetuates the effects of racial job segregation is unlawful if differences in treatment under the system are "the result of an intention to discriminate because of race...." 42 U.S.C. §2000e-2(h). Teamsters, 431 U.S. at 353. This Court has observed that in "[d]etermining whether invidious discriminatory purpose was a motivating

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6/ continued)

The court of appeals further held that only the local unions were named in the original 1969 administrative charges filed with the Equal Employment Opportunity Commission. Thus the court ruled that while the liability of the local unions commenced with the filing of the 1969 charges, the liability of the four international unions commenced with the filing of amended charges in 1973. App. 30a-31a. The plaintiffs have filed a petition for a writ of certiorari, Terrell, et al. v. International Association of Machinists, et al., No. 81-1069, presenting the question of whether the 1969 charges, properly construed, adequately named the international unions.

factor [it is necesssary to make] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Thus, a court's determination of whether an intent to discriminate entered the establishment or maintenance of a seniority system depends upon the particular factual context in a specific plant. The union petitioners essentially argue that the Teamsters standard was improperly applied by the court of appeals to the particular factual context of the Bessemer, Alabama plant of United States Pipe and Foundry Company. The writ of certiorari should not be granted. It is not the role of this Court to sit as a second-tier appellate court "review[ing] the evidence and discuss[ing] specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925).

2. The court of appeals correctly applied the legal standards in determining that "the Bessemer system cannot qualify for the immunity extended by section 703(h) of Title VII only to those seniority systems created and maintained without intention to discriminate." App. 20a-21a. The union petitioners fail to describe adequately the record of intentional discrimination in the creation and maintenance of the system.

a. Origin of the system. The seniority system during the period at issue, from the mid-1960s to the entry of settlement in 1979, was created during the period from 1939 through 1950. The period included two contested bargaining unit elections and a transfer of jobs between

bargaining units. The evidence overwhelmingly demonstrates that the system was created with an intent to discriminate. First, the AFL Unions which were instrumental in the creation of the system were openly racist.

> ...the Machinists barred blacks from union membership. The Boilermakers relegated blacks to inferior "auxiliary" locals, the Molders segregated the few blacks in their Alabama locals, and the Patternmakers claimed that there were no "qualified niggers" in the state.

App. 19a.[7/] Second, the union elections

7/ The district court also found that there was "widespread racial discrimination ... in the [AFL] unions...." App. 16b, 20b. The Boilermakers and Machinists, Petition No. 81-1118, p.7, n.6, wrongly dispute the findings of both lower courts by asserting that the Machinists and Boilermakers had had black members and officers in the 1940s and 1950s. For example, they refer to the testimony of Hembree that he was a local officer in the Boilermakers, apparently in the mistaken belief that Hembree is black. In fact, the transcript indicates that Hembree is white. (June 1979 Trial Transcript, p. 300).

in 1940 "had racial implications." App. 16b. Third, while the National Labor Relations Board included black-held jobs within the bargaining units of the Machinists and Boilermakers, these unions subverted the NLRB certification by failing to represent the black workers.[8/] Fourth, the subversion of the NLRB certification was completed by a 1950 transfer of jobs between the Steelworkers and the boilermakers and Machinists: the trial and appellate courts both held that this transfer was racially motivated, see p. 6, supra.[9/]

8/ At first the Machinists segregated the black workers who attended union meetings and then they told the blacks that "they couldn't represent [blacks]." Transcript, p. 230.

9/ The transfer agreement expressly referred to race--"Millwright Helpers (white)," "Helpers (white)," App. 4i. Nevertheless, the Machinists and Boilermakers contend that the holding by the two

Fifth, in 1949 the Molders petitioned the NLRB to certify a unit composed of the only two jobs in the Foundry department which were staffed exclusively by white workers; the Molders rejected the inclusion of helper positions, staffed by blacks, which were functionally related to the white-only jobs included in the unit. Sixth, the constitutions of the Boilermakers, Machinists and Molders provided for the representation by these unions of workers in helper and related production jobs. However, these unions rejected the inclusion in their bargaining units in the Bessemer plant of helper and related production jobs which were staffed by

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9/ continued

lower courts that the 1950 transfer was racially motivated is a "subsidiary ruling" which requires review. Petition, No. 81-1118, pp. 21-22.

blacks. Seventh, as the district court found, "inconsistent approaches are taken with respect to helper positions....those with white incumbents [unlike those with black incumbents] were joined by the AFL Unions to their related skilled positions." App. 19b.

Finally, as a result of a decade of manipulation, the goal of segregation was attained; after the 1950 job transfers, the bargaining units of the AFL Unions were staffed exclusively by white workers.

b. Maintenance of the System. The racial segregation established by the creation of the seniority system was maintained by the seniority forfeiture or "seniority suicide" provisions in the collective bargaining agreements--if an employee transferred from a job in the unit represented by one union to a job in a unit

represented by another union, he forfeited all his accumulated seniority. In a lay-off he would be the first worker in the unit to lose his job. As both lower courts found, black workers were adversely affected by the seniority system since black workers had been isolated into the lower-paying jobs in departments which provided little opportunity for promotion.[10/]

This racially based and discriminatory seniority system was maintained with an intent to discriminate. App. 18a.[11/] First,

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10/ For example, in 1971 only 4.2% or 11 out of 262 workers in the seniority units represented by the AFL Unions were black, whereas 78.8% or 404 out of 513 workers in the seniority units represented by the Steelworkers were black. Plaintiffs exhibits 28d, 78.

11/ The district court found that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 negotiations concerning the modification of seniority...." App. 236. However, the court concluded that the resistance of the AFL Unions to

in collective bargaining sessions with the AFL Unions during the period from 1968 through 1977, the company proposed modifications in the seniority system which would have reduced or terminated the adverse racial consequences of the system. The AFL Unions adamantly refused any modifications in 1968 and 1971 and agreed to only minor modifications in 1975 and 1977. Second, the Steelworkers in meetings of the union representatives proposed that the unions all agree to a seniority system which would finally end the effects of racial segregation. The Steelworkers' representative testified that the proposal

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11/ continued

change was not based upon intentional discrimination. The district court erred in failing to make "a sensitive inquiry into" the overwhelming circumstantial and direct evidence of discrimination. Arlington Heights, 429 U.S. at 266.

ran into a "brick wall"--the AFL Unions' intransigence. Transcript, pp. 111-12.

Third, during the period when the AFL Unions refused to modify the racially discriminatory seniority system, it was apparent that local union officers were racially biased.[12/] Fourth, at least the Patternmakers violated its own procedures when it failed, as did the other AFL Unions, to agree to any modification of

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12/ In an affidavit submitted in 1969 to the EEOC, the president of Molders Local 362 stated with respect to a black in the union that "[a]s long as he stays in his place, he's alright with me." Plaintiffs' exhibit 70. The president also informed black workers that "[w]e didn't want you all in here to start with" and he refused to represent black workers in grievance disputes. Transcripts, pp. 191-96. A business manager of the Patternmakers Association of Birmingham told an EEOC investigator that "there were no qualified niggers." Transcript, pp. 410, 473, see 438-39.

the seniority system in 1971. The international representative testified that he participated in the 1971 negotiations, that the membership had agreed to the proposal providing for inter-union transfer, and that the proposal "absolutely" should have been included in the collective bar gaining agreement. Transcript, pp. 426-28. When the representative was shown on the stand that the proposal had not been included in the agreement, he testified that he was "greatly disturbed" and that the failure to include the provision was "a violation of our bylaws." Transcript, pp. 429, 462. The Steelworkers' representative testified that the AFL Unions did not discuss why they refused to modify the discriminatory seniority system in 1971. Plaintiffs' exhibit 47, p.45.

Despite the efforts of the company and the Steelworkers to modify the seniority system, the system remained discriminatory because of the resistance of the AFL Unions until the entry of the settlement agreement in 1980. .

3. The decision of the appellate court is limited to this unique and specific factual record. The evidence of intentional discrimination is based upon a particular history of interaction over a period of 40 years between eight AFL Unions, the Steelworkers and United States Pipe and Foundry Company. The appellate decision based upon this particular factual record does not present issues of law of any general importance which may be applicable to resolve issues arising in other factual

contexts.[13/]

4. The appellate court applied the proper standard in evaluating whether the findings of the district court were clearly

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13/ Contrary to the assertion of petitioners, No. 81-1118, p. 19, the appellate decision does not conflict with the decisions of the Fourth, Sixth or District of Columbia Circuits. In Patterson v. American Tobacco Company, 634 F.2d 744, 750, n.6 (4th Cir. 1980), cert. granted on other grounds, No. 80-1199, the Fourth Circuit specifically approved the Fifth Circuit's application of Teamsters: "For guidance in addressing the issue [bona fides of a seniority system] the district court may find helpful the Fifth Circuit's decision in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 350-53 (5th Cir. 1979)." Similarly, the Sixth Circuit has specifically approved the approach taken by the Fifth Circuit in James. Equal Employment Opportunity Commission v. Ball Corp., 661 F.2d 531, 539 (1981); Taylor v. Mueller Co., 26 FEP Cases 1695, 1699-1700 (1981). The decision of the District of Columbia Circuit cited by petitioners, United States v. Trucking Employers, Inc., 561 F.2d 313 (1977), did not decide the issue of the bona fides of a seniority system and did not, in any way, conflict with the decisions of the Fifth Circuit.

erroneous. The court concluded that "the totality of circumstances surrounding the creation and maintenance of the seniority system ... 'leaves us with the definite and firm conviction that a mistake has been made....'" App. 20a. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The appellate court applied the proper standard. There is no issue properly raised concerning the application of Rule 52(a), Federal Rules of Civil Procedure, other than the question of whether on this particular record the specific conclusions of the appellate court were correct. These conclusions were correct, see pp. 11-20. In any case, it is not appropriate to grant a petition in order for this Court to sit as a second-tier appellate court to review specific findings and conclusions which have no general importance and which

do not conflict in any way with the decisions of the other circuit courts.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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